No. 08-1233

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BROOKSHIRE BROTHERS HOLDING, INC., *et al.*,

Petitioners,

v.

DAYCO PRODUCTS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS TICONA POLYMERS, INC., SHELL CHEMICAL LP, AND UNDERWRITERS LABORATORIES INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court's order remanding the case to state court following its discretionary decision to decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) is barred from appellate review by 28 U.S.C. § 1447(d)?

2. Whether the district court's order remanding the case to state court under 28 U.S.C. § 1367(c) is barred from appellate review under 28 U.S.C. § 1452(b), even though the district court's remand order relied exclusively upon 28 U.S.C. § 1367(c) and never cited 28 U.S.C. § 1452(b)?

LIST OF PARTIES AND RULE 29.6 NOTATION

The following persons were parties to the proceedings in the court of appeals:

Plaintiffs-appellees-petitioners:

Brookshire Brothers Holding, Inc.

Brookshire Brothers Management, Inc.

Brookshire Ltd.

Defendants-appellants-respondents:

Dayco Products, Inc.

Mark IV Industries, Inc.

Shell Chemical LP

Ticona Polymers, Inc.

Underwriters Laboratories Inc.

Respondent, Dayco Products, Inc. ("Dayco"), is a wholly owned subsidiary of its parent, Mark IV Industries, Inc. ("Mark IV"). No publicly held company owns 10% or more of Dayco's stock. Respondent, Mark IV, is a wholly owned subsidiary of its parent, MIV Holdings, S.A., a Luxembourg Company. No publicly held company owns 10% or more of Mark IV's stock. On April 30, 2009, Dayco and Mark IV filed voluntary petitions for relief in the United States Bankruptcy Court for the Southern District of New York under 11 U.S.C. §§ 101 *et seq*. As such, all claims against Dayco and Mark IV are automatically stayed pursuant to 11 U.S.C. § 361(a).

Respondent, Shell Chemical LP, is a Delaware limited partnership whose general partner is Shell Oil Company and whose limited partner is SCOGI, LP. Its general partner, Shell Oil Company, is a wholly owned subsidiary of its parent, Shell Petroleum Inc., which in turn is owned by Shell Petroleum N.V. Two publicly held companies, Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, plc, respectively own 60% and 40% of the stock of Shell Petroleum N.V.

Respondent, Ticona Polymers, Inc., now known as Ticona, is a business of Celanese Corporation, a publicly traded company.

Respondent, Underwriters Laboratories Inc., is an independent, not-for-profit corporation which has no parent. No publicly held company owns 10% or more of Underwriters Laboratories Inc.'s stock.

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INTRODUCTION

The Petition for a Writ of Certiorari filed by Brookshire Brothers Holding, Inc., Brookshire Brothers Management, Inc., and Brookshire Brothers Ltd. (collectively, "Brookshire") concerns the identical issue which the Court recently resolved in *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. ___, 129 S.Ct. 1862 (May 4, 2009). There, like here, the question presented was whether a federal court of appeals has jurisdiction to review a district court's order remanding a case to state court after declining to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c). This Court held unequivocally that a federal court of appeals may review such a remand order because "[w]hen a district court remands claims to a state court after declining to exercise supplemental jurisdiction, the remand order is not based on a lack of subject-matter jurisdiction for purposes of §§ 1447(c) and (d)." 129 S.Ct. at 1867. The result should be no different here.

This case was removed from Louisiana state court to federal court in May 2004 on the ground that it was "related to" the bankruptcy of one of the defendants. At the time of removal, Brookshire did not move to remand the case to state court. To the contrary, Brookshire admitted that federal subject matter jurisdiction existed and that the case had been properly removed to federal court. However, more than three years later and just months before the case was scheduled for trial in federal court, Brookshire moved to remand the case to state court, arguing that the claims relating to the bankrupt entity had been resolved.

Despite the impending trial date and despite devoting enormous resources to the case, the federal court declined to exercise supplemental jurisdiction over the remaining state law claims under 28 U.S.C. § 1367(c), and remanded the case to the Louisiana state court. On appeal, the Fifth Circuit reversed, holding that: (1) it had jurisdiction to review the remand order; and (2) the district court had abused its discretion in declining to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) because of, among other things, the significant investment of judicial resources and the likelihood that defendants would be prejudiced by remand to state court.

Brookshire's Petition states no valid ground for this Court to grant review of the Fifth Circuit's decision. Brookshire claims only that the Fifth Circuit did not have jurisdiction to review the remand order because (i) remands for lack of subject matter jurisdiction are not reviewable under 28 U.S.C. §§ 1447(c) and (d); and (ii) 28 U.S.C. § 1452(b) bars review of orders remanding cases "related to" a bankruptcy. As shown below, both arguments are meritless.

First, as Brookshire admits, this case concerns the very same issue which the Court decided in *Carlsbad Technology*. As the Court made clear in *Carlsbad Technology*, the statutory bar under 28 U.S.C. § 1447(d) against appellate review of remand orders for lack of subject matter jurisdiction is inapplicable where, as here, the remand was issued under 28 U.S.C. § 1367(c). Thus, consistent with *Carlsbad Technology*, the Fifth Circuit properly exercised its appellate jurisdiction to review the district court's remand order under § 1367(c) for an abuse of discretion.

Second, the statutory bar under 28 U.S.C. § 1452(b) against appellate review of orders remanding cases "related to" bankruptcy matters is inapplicable here. Neither the parties nor the Fifth Circuit raised the issue on appeal, and thus it is not properly before this Court. Moreover, even if Brookshire had properly preserved the issue, the district court's remand order was based expressly and solely upon § 1367(c), and the courts below never cited or referenced § 1452(b). Finally, Brookshire argues simply and erroneously that the Fifth Circuit may have been incorrect in reviewing the remand order. Such an argument does not warrant review by this Court, which requires (among other things) a conflict with a decision of this Court or another United States court of appeals, or an important, but unresolved, question of federal law — none of which is even alleged here.

COUNTERSTATEMENT OF THE CASE

Respondents — Ticona Polymers, Inc., Shell Chemical LP, and Underwriters Laboratories Inc. — adopt and incorporate by reference the Fifth Circuit's statement of the factual background and procedural history as set forth in its published opinion.[1] (*See* Brookshire's Appendix A, at 1a-14a.) Set forth below are only those facts salient to the matter now before this Court.

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1. In light of their recent bankruptcy filing, Dayco and Mark IV have not joined this Opposition. However, counsel for Dayco and Mark IV have provided written assurances that they have no objection to the filing of this Opposition.

I. *Trial Court Proceedings*

On August 15, 2003, Brookshire filed this products liability action in Louisiana state court against multiple defendants (including Respondents), alleging damage from leaking underground pipes at gasoline stations in Texas and Louisiana. (*Id.* at 2a.) Thereafter, on May 26, 2004, the action was removed to the United States District Court for the Western District of Louisiana (the "District Court") pursuant to 28 U.S.C. §§ 1334(b) and 1452 on the ground that it was "related to" the bankruptcy of one of the defendants, Total Containment, Inc. ("TCI"). (*Id.*) In the courts below, Brookshire "concede[d] that the case was properly removed and that the district court had [subject matter] jurisdiction over the suit at the time of removal." (*Id.*)

Following removal, this case was actively litigated in the District Court for more than three years, generating in excess of 1,300 entries in the District Court's docket. *Id.* During that time, the District Court decided 41 dispositive motions, as well as 14 *Daubert* and 7 *in limine* motions related to proposed expert testimony. (*Id.*) The District Court also addressed several procedural and substantive issues in the case under Texas and Louisiana law, including choice of law and the statute of limitations. (*Id.* at 2a & 13a.)

After discovery had closed and as the parties were making final preparations for the February 11, 2008 trial date, Brookshire, TCI, and TCI's insurers settled their disputes and filed a joint stipulation dismissing Brookshire's claims against those defendants. (*Id.* at 3a.) Shortly thereafter, on November 2, 2007, Brookshire moved to remand the case to Louisiana state court. (*Id.*)

On November 27, 2007, the District Court granted Brookshire's motion, specifically declining to exercise supplemental jurisdiction over the remaining state law claims under § 1367(c). (Brookshire's Appendix B, at 15a-17a.) The language of the District Court's order is clear and unambiguous. Not only does the remand order quote § 1367(c) in its entirety and cite the statute several times, but it cites no other authority. Indeed, in declining to exercise supplemental jurisdiction, the remand order provides expressly that "[u]nder 28 U.S.C. § 1367(c), this Court has discretion as to whether to keep the current pending claims or remand to State court." (*Id.* at 15a.) The District Court then ruled that "[w]hile it is certainly within our discretion to retain this case for further proceedings, after examining the factors enumerated in § 1367(c) . . . [this case] would be more properly decided by a State forum." (*Id.* at 16a.) Thereafter, Respondents timely filed a notice of appeal.

II. *The Fifth Circuit's Decision*

Soon after Respondents filed their notice of appeal, Brookshire moved to dismiss the appeal solely on the ground that the Fifth Circuit lacked jurisdiction under 28 U.S.C. § 1447. Following briefing on the matter, on February 6, 2008 the Fifth Circuit denied that motion.

In its brief on the merits, Brookshire argued only that the Fifth Circuit should (i) dismiss the appeal for lack of jurisdiction under 28 U.S.C. § 1447; and (ii) affirm the District Court's discretionary remand under 28 U.S.C. § 1367(c). Brookshire never argued, much less suggested, that the Fifth Circuit lacked jurisdiction under 28 U.S.C. § 1452(b). (Brookshire's Appendix A, at 3a.)

Consistent with established jurisprudence, on January 6, 2009 the Fifth Circuit rejected each of Brookshire's arguments and reversed the District Court's discretionary remand order, holding:

- That appellate jurisdiction existed to review the remand order because the District Court did not remand the case on any of the grounds specified in § 1447(c) for lack of subject matter jurisdiction or for a defect in removal procedure. (*Id.* at 3a-4a.) Rather, the Fifth Circuit explained that the District Court expressly based its remand order on § 1367(c) and that the remand order could not be, as Brookshire argued, "colorably characterized" as a remand for lack of subject matter jurisdiction under § 1447(c). (*Id.* at 8a-9a.) As a discretionary remand under § 1367(c), the District Court's order was therefore reviewable on appeal for abuse of discretion, and was not barred under §§ 1447(c) and (d). (*Id.* at 10a); and

- That under the statutory factors set forth in § 1367(c) and the common law factors of judicial economy, convenience, fairness and comity, the District Court had abused its discretion by declining supplemental jurisdiction over the remaining state law claims and remanding the case to state court. (*Id.* at 10a-14a.) In so ruling, the Fifth Circuit noted that the District Court had invested a significant amount of resources in the case over the course of three years and that the remaining issues of state law were not novel or complex. (*Id.* at 13a.) The Fifth Circuit

> further recognized that there was "a significant risk that Brookshire will attempt to re-litigate in state court rulings made against it by the district court, including those relating to choice of law, prescription, breach of implied warranty, and application of Texas's economic-loss rule, and that this would cause the flexpipe defendants substantial prejudice." (*Id.* at 13a-14a.)

As a result, the Fifth Circuit remanded the case to the District Court for all further proceedings. (*Id.* at 14a.) Brookshire then filed a petition for rehearing en banc, which the Fifth Circuit denied on February 5, 2009. (Brookshire's Appendix C, at 18a-19a.)

III. *Brookshire's Conduct Following The Fifth Circuit's Ruling*

The Fifth Circuit's concerns about Brookshire's litigation tactics were well-founded. On January 7, 2009 — the day after the Fifth Circuit's decision — Brookshire's counsel sent a letter to the Louisiana state court judge, asserting that the state court could proceed with a previously scheduled hearing on January 26, 2009 concerning numerous pending motions. In response, the Louisiana state court judge sent a letter to all counsel, stating that he would proceed with the case, including the January 26 hearing. Thereafter, on January 16, 2009, Brookshire filed numerous pleadings in the Louisiana state court requesting, among other things, that the state court revisit many of the federal District Court's prior rulings on summary judgment and other substantive issues. As a result, Respondents moved to stay all further proceedings in the state court. That motion was denied by the state court.

Subsequently, on January 20, 2009, Respondents filed an emergency motion in the Fifth Circuit to, among other things, enjoin all proceedings in the Louisiana state court. Following briefing, on January 23, 2009 the Fifth Circuit granted Respondents' motion. (*See* Respondents' Appendix A, attached hereto.) The Fifth Circuit did so in aid of its own jurisdiction, to prevent the Louisiana state court from interfering with the District Court's authority, and to protect Respondents' rights to proceed in a federal forum consistent with the Fifth Circuit's decision. (*Id.* at 2a-3a.) As the Fifth Circuit explained, "[p]ermitting the state court to rule on dispositive motions in this suit, which, as our opinion made clear, is properly before the federal district court, would seriously interfere with the federal district court's consideration of the case and deprive the defendants-appellants of their right to proceed in a federal forum." (*Id.*)

REASONS FOR DENYING THE PETITION

I. Brookshire's First Question Presented States No Valid Ground For Review In Light Of This Court's Recent Holding In *Carlsbad Technology, Inc. v. HIF Bio, Inc.*

Brookshire admits that its Petition raises the identical question presented in *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. ___, 129 S.Ct. 1862 (May 4, 2009), and has urged this Court to "hold" the Petition "pending the decision" in that case. (Pet. at 1.) This Court has now rendered its opinion in *Carlsbad Technology*, which all members of the Court joined and which conclusively determines Brookshire's first Question Presented. As the Court held in *Carlsbad*

Technology: "When a district court remands claims to state court after declining to exercise supplemental jurisdiction, the remand order is not based on a lack of subject-matter jurisdiction for purposes of §§ 1447(c) and (d)," and therefore appellate review of such an order is not barred by 28 U.S.C. § 1447(d). 129 S.Ct. at 1867. The Fifth Circuit's decision at issue here is fully consistent with *Carlsbad Technology*, and Brookshire states no reason for this Court to grant review of the same question definitively resolved in that case.

In *Carlsbad Technology*, the Court addressed the following question: "Whether a district court's order remanding a case to state court following its discretionary decision to decline to exercise the supplemental jurisdiction accorded to federal courts under 28 U.S.C § 1367(c) is properly held to be a remand for a 'lack of subject matter jurisdiction' under 28 U.S.C. § 1447(c) so that such remand order is barred from any appellate review by 28 U.S.C. § 1447(d)." (Brief for the Petitioner in *Carlsbad Technology* at ii; 129 S.Ct. at 1864, 1866.) As Brookshire admits, "[t]his case presents the same issue . . . presented by . . . *Carlsbad Tech., Inc. v. HIF Bio, Inc.*" (Pet. at 7; *see also id.* at i, Question Presented #1 ("Whether the district court's order remanding the case to state court following its discretionary decision to decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) is barred from appellate review by 28 U.S.C. § 1447(d)").) As Brookshire also admits, "this case likely will be controlled by this Court's decision in *Carlsbad Technologies*." (Pet. at 7.)

It is not just "likely" that this Court's holding in *Carlsbad Technology* controls the outcome of this case — it is certain. The facts of this case as alleged by Brookshire are consistent with the facts of *Carlsbad Technology*. Both cases involved properly removed claims over which the district court had subject matter jurisdiction, as well as supplemental state law claims under 28 U.S.C. § 1367(a). *See* Pet. at 3 (removal of "related-to" bankruptcy claims under 28 U.S.C. §§ 1334 and 1452(a), as well as state law claims); 129 S.Ct. at 1865 (removal of Racketeer Influenced & Corrupt Organizations Act ("RICO") claim under 28 U.S.C. §§ 1961-1968, as well as state law claims). In both cases, the federal claim that existed at the time of removal was later disposed of in the federal court, leaving only the supplemental state law claims remaining. *See* Pet. at 3 (Brookshire settled with the party which had filed for bankruptcy, and that party's insurers were either dismissed on summary judgment, dismissed by Brookshire, or settled with Brookshire; state law claims remained against the other parties); 129 S.Ct. at 1865 (RICO claim dismissed pursuant to Fed. R. Civ. P. 12(b)(6); state law claims remained). And in both cases, the district court declined to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) over the remaining state law claims and remanded the case to state court. *See* Brookshire's Appendix B at 16a (declining to exercise supplemental jurisdiction under § 1367(c), and remanding the case to state court); 129 S.Ct. at 1865 ("The District Court also declined to exercise supplemental jurisdiction over the remaining state-law claims pursuant to 28 U.S.C. § 1367(c)(3) . . . .").

Moreover, just like the petitioner in *Carlsbad Technology*, Brookshire argues that because the bankruptcy-related claims had been disposed of at the time

the District Court considered the motion to remand under § 1367(c), the District Court lacked subject matter jurisdiction and was required to remand the case under §§ 1447(c) and (d). (Pet. at 14.) However, in *Carlsbad Technology*, the Court squarely addressed and rejected that argument. The result should be no different here.

First, in *Carlsbad Technology*, the Court reaffirmed its holding in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976), that the prohibition on review of remand orders contained in § 1447(d) must be read *in pari materia* with § 1447(c), thus limiting the remands barred from appellate review by § 1447(d) to those which are based on a ground specified in § 1447(c).[2] 129 S.Ct. at

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2. As this Court has repeatedly recognized for the more than three decades since *Thermtron*, § 1447(d) prohibits appellate review of remand orders only where, unlike here, the district court specifies a ground for remand within the scope of 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction or for a timely raised defect in removal procedure. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 231 (2007) ("[W]hen a district court remands a properly removed case because it nonetheless lacks subject-matter jurisdiction, the remand is covered by § 1447(c) and thus shielded from review by § 1447(d)"); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) (explaining that "§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)"); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995) ("As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction — the grounds for remand recognized by § 1447(c) — a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)").

1865-66.[3] Second, this Court made clear in *Carlsbad Technology* that there is a distinction between (1) whether a court has subject matter jurisdiction over a claim, and (2) whether a court chooses to exercise that jurisdiction. *Id.* at 1866. Applying that distinction, this Court explained that with respect to supplemental jurisdiction, a federal court has subject matter jurisdiction over state law claims, but has discretion in determining whether to exercise such jurisdiction. *Id.* "A district court's decision whether to exercise that [supplemental] jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary." *Id.* (citation omitted). As a result, a district court's exercise of its discretion under § 1367(c) is not a jurisdictional matter. *Id.* at 1867. Because that decision is discretionary (not jurisdictional), a § 1367(c) remand order "is not based on a 'lack of subject matter jurisdiction' for purposes of the bar to appellate review created by §§ 1447(c) and 1447(d)." *Id.* The Fifth Circuit's decision at issue here, which reviewed the District Court's discretionary remand order under § 1367(c), is fully consistent with this Court's reasoning.[4] *See* Brookshire's Appendix A at 1a-14a.

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3. This Court stated that it was not revisiting whether *Thermtron* was correctly decided and further noted that neither party had asked the Court to revisit *Thermtron*. *Carlsbad Technology*, 129 S.Ct. at 1865-66 n.*. Brookshire likewise does not request that this Court overrule its prior opinion in *Thermtron*. To the contrary, Brookshire has attempted to "reconcile" *Thermtron's* holding with its arguments, and seeks a result "consistent with *Thermtron's* reasoning." *See* Pet. at 10 & 14.

4. Similarly, Brookshire's argument at pages 10-14 of its Petition — *i.e.*, that the 1988 and 1996 amendments to 28 U.S.C. § 1447(c) somehow cause the scope of remand orders for which

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Given this Court's unequivocal decision in *Carlsbad Technology*, it is clear that the Fifth Circuit had jurisdiction to review the District Court's remand order, and there are no grounds for this Court to review Brookshire's first question presented.

II. The Statutory Bar Under 28 U.S.C. § 1452(b) Against Appellate Review Of Orders Remanding Cases "Related To" Bankruptcy Matters Is Inapplicable Here

Despite Brookshire's claim (Pet. at 14-20), the statutory bar under 28 U.S.C. § 1452(b) against appellate review of orders remanding cases "related to" bankruptcy matters is inapplicable here, and thus provides no grounds for this Court to grant certiorari.

A. *Brookshire Failed To Preserve This Issue For Review By The Court*

Brookshire admits that it raised this issue for the first time in its Petition for a Writ of Certiorari, having never argued that 28 U.S.C. § 1452(b) barred the Fifth Circuit from reviewing the remand order in its motion to dismiss Respondents' appeal for lack of jurisdiction, its brief on the merits, or its petition for rehearing en

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appellate review is barred by § 1447(d) to include remand orders under § 1367(c) — was briefed by the parties in *Carlsbad Technology*, raised during oral argument, and rejected by this Court. *See Carlsbad Technology*, Brief for Petitioner at 31-41 & n.6; Brief for Respondents at 12-13 & n.9, 10; Reply Brief for Petitioner at 23-25; and Oral Argument Transcript at 17 (Feb. 24, 2009).

banc. (Pet. at 6, 19.) As this Court has explained, a question presented for the first time in a petition for certiorari "is not properly before us." *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981). *See also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004) (explaining that "'[w]e ordinarily do not decide in the first instance issues not decided below'") (citation omitted); *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (same).[5] Given Brookshire's admission, it is beyond dispute that this issue was not properly preserved for review by this Court.

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5. Nonetheless, Brookshire cites authority for the unremarkable proposition that subject matter jurisdiction cannot be waived. *See United States v. Storer Broad. Co.*, 351 U.S. 193 (1956); *Glidden v. Zdanok*, 370 U.S. 530 (1962); *City of Gainesville v. Brown-Crummer Invest. Co.*, 277 U.S. 54 (1928); *Mansfield v. Swan*, 111 U.S. 379 (1884). However, subject matter jurisdiction is not at issue here. To the contrary, the issue presented by Brookshire concerns only appellate jurisdiction. Unlike appellate jurisdiction, subject matter jurisdiction concerns the power of the federal courts to hear a matter in the first instance. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (explaining that subject matter jurisdiction cannot be waived because "it involves the court's power to hear a case") (citation omitted). By contrast, appellate jurisdiction concerns whether a court of appeals may review a matter which has already been litigated in the federal courts. *Cf. Youngblood v. West Virginia*, 547 U.S. 867, 874 (2006) (Scalia, J., dissenting) ("'[I]t is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted. . .'") (quoting *Marbury v. Madison*, 1 Cranch 137, 175 (1803)).

B. *The District Court's Remand Order Was Expressly And Unambiguously Under § 1367(c), And Thus § 1452(b)'s Bar On Appellate Review Is Irrelevant*

Even if Brookshire had preserved the issue, its argument is beside the point and provides no grounds for the Court's review of the matter. As Brookshire admits (Pet. at 15-16), the District Court's remand order was based solely and expressly upon § 1367(c), and the courts below never cited, much less relied upon, § 1452(b). (*See* Brookshire's Appendix B, at 15a-17a.) An appellate court should not "decipher the tea-leaves of a district court's remand order" where, as here, it makes a "clear-statement" that it was issued under § 1367(c). *See Certain Underwriters at Lloyds v. Warrantech Corp.*, 461 F.3d 568, 572-73 (5th Cir. 2006); *Heaton v. Monogram Credit Card Bank of Georgia*, 231 F.3d 994, 997-98 (5th Cir. 2000) (same).[6] Thus, § 1452(b)'s bar to appellate review is irrelevant here, given (among other things) the clear statements in the remand order.

Faced with the plain language of the remand order, Brookshire argues erroneously that (1) the § 1367(c) factors relied upon by the District Court somehow constitute equitable grounds under § 1452(b); and (2) the remand order allegedly should be construed under § 1452(b) because the case was removed to federal court under § 1452(a). (Pet. at 15-18.) Brookshire is wrong.

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6. While this Court has yet to address the issue, Justice Scalia recently stated that "appellate courts [should not] look behind the stated basis for the district court's remand order." *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 650 (2006) (Scalia, J., concurring).

First, while there may be some overlap in the factors considered under § 1367(c) and § 1452(b), there are critical differences. Most significantly, under § 1452(b), courts must consider various factors that concern bankruptcy-related issues, including: (1) the existence of a right to a jury trial; (2) the effect on the efficient administration of the bankruptcy estate; and (3) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case. *See In re Adelphia*, 285 B.R. 127, 144 (S.D.N.Y. 2002) (citation omitted); 1-3 Collier on Bankruptcy, p. 3.07[5] (15th ed. Rev. 2009). None of these factors, however, are considered under § 1367(c). *See Carnegie Mellon v. Cohill*, 484 U.S. 343, 350 (1988) (instructing the lower courts to focus on principles of judicial economy, convenience, fairness and comity under § 1367(c)). Given the additional, bankruptcy-related factors under § 1452(b) and the unambiguous language of the remand order relying solely upon § 1367(c), it strains credulity for Brookshire to even argue that the factors the District Court considered in remanding the case constituted equitable grounds under § 1452(b).[7]

Second, there is no basis to construe the remand order as being under § 1452(b) simply because the case

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7. Oddly, Brookshire cites a handful of cases for the non-controversial proposition that the "equitable" grounds under § 1452(b) should be construed broadly. (Pet. at 15.) However, none of those cases even addresses § 1367(c). *See Things Remembered*, 516 U.S. 124; *In re Seven Fields Dev. Corp.*, 505 F.3d 237 (3d Cir. 2007); *Allied Signal Recovery Trust v. Allied Signal, Inc.*, 298 F.3d 263 (3rd Cir. 2002); *Hawking v. Ford Motor Co.*, 210 F.3d 540 (5th Cir. 2000); *Cathedral of the Incarnation v. Garden City Co.*, 90 F.3d 28 (2d Cir. 1996).

was originally removed to federal court on "related to" bankruptcy grounds. As this Court has observed, "[t]here is no express indication in § 1452 that Congress intended that statute to be the exclusive provision governing removals and remands in bankruptcy." *Things Remembered*, 516 U.S. at 129. In addition, the Fifth Circuit has explained that where, as here, a case is removed under § 1452(a) and the bankruptcy-related claims are later dismissed, leaving supplemental state law claims within the court's jurisdiction, "the court's remand authority switches from that under § 1452 to that under § 1367." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 455 n.3 (5th Cir. 1996) (citing *Cohill*, 484 U.S. at 354 n.11 for the proposition that "the remand authority conferred by the removal statute and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all").

Further undercutting Brookshire's argument is that supplemental jurisdiction under § 1367(c) can indeed exist over state law claims in a case which is "related to" a bankruptcy matter. *See, e.g., Security Farms v. Int'l Brotherhood of Teamsters*, 124 F.3d 999, 1008 n.5 (9th Cir. 1997) (recognizing that the case was "related to" a bankruptcy matter, and also included state law claims over which the federal court had supplemental jurisdiction); *Doddy*, 101 F.3d at 455 n.3 (explaining that where, as here, a case is removed to federal court on "related to" grounds, the district court also had supplemental jurisdiction over pendent tort claims); *In re Cuyahoga Equipment Corp.*, 980 F.2d 110, 115 (2d Cir. 1992) ("Given an independent jurisdictional source like that provided by § 1334(b), federal courts possess supplemental jurisdiction over related claims").

Here, once the claims against the bankrupt entity and its insurers were resolved by settlement or dismissal after removal, only the supplemental state law claims remained against the non-bankrupt defendants. As such, the District Court's discretionary remand order was purely and simply under § 1367(c), not § 1452(b), and the Fifth Circuit had jurisdiction to review the remand order consistent with *Carlsbad Technology*.

C. *Brookshire's Argument Does Not Warrant Review By This Court*

Not only is Brookshire's argument incorrect, but it fails to merit review by this Court. Brookshire does not argue that the Fifth Circuit's decision conflicted with any decision of this Court or another United States court of appeals on the same important matter, or that the Fifth Circuit decided an important question of federal law which has not been, but should be, decided by this Court. *See* Sup. Ct. R. 10(a) & (b). Rather, Brookshire argues simply and erroneously that the Fifth Circuit should not have reviewed the remand order. Assuming *arguendo* (and contrary to fact and law) that the Fifth Circuit was barred from reviewing the remand order, Brookshire's argument plainly does not warrant review by this Court. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). *Cf. Powell v. Nevada*, 511 U.S. 79, 86 (1994) (Thomas, J., dissenting) (noting that the writ of certiorari should only be granted "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where

there is a real and embarrassing conflict of opinion between the circuit courts of appeal") (citation omitted). This case presents no such compelling reason or consideration worthy of this Court's review.

CONCLUSION

For the foregoing reasons, Respondents — Ticona Polymers, Inc., Shell Chemical LP and Underwriters Laboratories Inc. — respectfully request that this Court deny Brookshire's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 23, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-31154

BROOKSHIRE BROTHERS HOLDING INC; BROOKSHIRE BROTHERS MANAGEMENT INC; BROOKSHIRE BROTHERS LTD

Plaintiffs-Appellees

v.

DAYCO PRODUCTS, INC; SHELL CHEMICAL LP; TICONA POLYMERS INC; MARK IV INDUSTRIES LTD; UNDERWRITERS LABORATORIES INC

Defendants-Appellants

Appeal from the United States District Court for the Western District of Louisiana, Lake Charles

Before HIGGINBOTHAM, BENAVIDES, and STEWART, Circuit Judges. PER CURIAM:

On January 6, 2009, this court found that the federal district court abused its discretion in remanding this case to Louisiana state court. After the opinion issued, the plaintiffs-appellees nonetheless requested that the state court rule on dispositive motions. The state court

has now indicated that it intends to rule on those motions at a hearing on January 26, 2009. The defendants-appellants have filed an emergency motion to enjoin the parties from proceeding in the state court and to have the panel issue the mandate instanter. We refuse to issue the mandate instanter because this would interfere with the right of the plaintiffs-appellees to have the en banc court consider their en banc request. However, we are convinced that the request for an injunction should be granted.

The plaintiffs-appellees contend that the issuance of an injunction is prohibited by the Anti-Injunction Act, 28 U.S.C. § 2283, which generally bars a federal court from granting an injunction to stay proceedings in state court. However, the requested injunctive relief in this case falls within one of the express exceptions to the general prohibition contained in the Anti-Injunction Act: a federal court may enjoin state court proceedings "where necessary in aid of its jurisdiction." *Id.* The plaintiffs-appellees argue that this exception does not apply in this case because of the Supreme Court's holding in *Kline v. Burke Construction Co.*, 260 U.S. 226, 230-31 (1922), that the maintenance of a state action in personam involving the same subject matter at issue in a concurrent federal action does not tend to impair or defeat the jurisdiction of the federal court. However, the underlying dispute in this case is not the subject of parallel state and federal actions, but of a single lawsuit which was brought in state court, removed to federal court, and later—erroneously—remanded to state court. Permitting the state court to rule on dispositive motions

in this suit, which, as our opinion made clear, is properly before the federal district court, would seriously interfere with the federal district court's consideration of the case and deprive the defendants-appellants of their right to proceed in a federal forum. *See Atl. Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970) (stating that the "necessary in aid of its jurisdiction" exception implies "that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case").

Nor is it clear that the Anti-Injunction Act reaches the relief we today grant. Its operative bite is the same as an order staying enforcement of an order of a district court pending review of its validity. Moreover this equitable relief serves to avoid undue friction between the federal and state courts and mitigate the costs of proceedings that will be voided if the present ruling of this panel stands. And it is unlikely that it will be overturned. Fed. R. App. P. 8 is no bar given the want of time. While there have been proceedings in the state court they have not until recently turned to efforts that will be undone on the vacating of the order of remand.

The motion for injunction is GRANTED, and the request for immediate issuance of mandate DENIED.